88-227

Supreme Court, U.S.
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NO._____

IN THE SUPREME COURT

OF THE UNITED STATES

SEPTEMBER TERM, 1988

LEWIS O. FERGUSON, Petitioner

v.

Norfolk Southern Corp., Respondents

PETITION FOR WRIT OF CERTIORARI TO THE

UNITED STATES COURT OF APPEALS FOR THE

FOURTH CIRCUIT

LEWIS O. FERGUSON, PETITIONER, PRO SE

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QUESTIONS PRESENTED FOR REVIEW

1. IS it unlawful AND is it a violation of Plaintiffs constitutuinal rights, when a financial holding company(defendant), operating under the rules and regulations of the Interstate Commerce Comission and The Railway Labor Act(RLA), does promote, encourage and participate in acts of terriorism, intimidation and threats upon the life/or safety of an employee(Plaintiff) of that company?

2. DOES Plaintiff have a constitutional right to seek damages against Defendant for having suffered severe and permanent harm due to the unlawful acts, and other acts, of Defendant?

3. IS is unlawful for District Court to order Summary Judgment for defendant when Plaintiffs interrogatories and request for production of documents have not been properly answered by Defendant?

4. DOES the National Rwy. Adjustment Bd. resolve unlawful conduct/constitutional matters?

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TABLE OF CITATIONS

Andrews v. L&N R.R:406 U.S. 320(1972).

Union Pacific R.R. v. Sheehan:439 U.S. 89,93-94(1978).

Choate v. L&N R.R.: 715 F.2d 369, 371-72(7th Cir. 1983).

Jim Buell v. Santa Fe R.R. : U.S. SUPREME COURT decision, dated March 1987.

IN THE SUPREME COURT OF THE UNITED STATES

SEPTEMBER TERM

NO. 87-3115

LEWIS O. FERGUSON, Petitioner

v.

NORFOLK SOUTHERN CORP., Respondant

PETITION FOR WRIT OF CERTIORARI TO

THE UNITED STATES COURT OF APPEALS

FOR THE FOURTH CIRCUIT

The Petitioner, LEWIS O. FERGUSON respectfully prays that a Writ of Certiorari be

(continued on next page)

issued to review the decision of the United States Court of Appeals for the Fourth Circuit, affirming the judgment of the U.S. District Court, that this civil action is a minor dispute within the exclusive jurisdiction of the Nat'l. R.R. Adj. Bd. Judgment dated and entered on June 30, 1987.

OPINION BELOW

The Court of Appeals entered its decision on Dec. 30, 1987, refused Plaintiffs Petition for rehearing on Jan. 26, 1988. Court of Appeals affirmed judgment on reasoning of District Court(Appendix A). Copy of Appeals Court denial for rehearing is attached as Appendix B.

JURISDICTION

Jurisdiction is invoked under Title 28 of U. S. Code and Rules of the Supreme Court.

CONSTITUTIONAL PROVISION

The constitutional right of a citizen to be secure in his person and possessions; and his right to a trial by jury. Also, to be protected from unlawful acts and conspiracy to commit same by agents/employees of Defendant.

STATEMENT OF THE CASE

The Railway Labor Act forbids retaliation or interference with an employee for Union activities. On Feb.5, 1987, complaint was filed at District Court charging Defendant with violation of the RLA during Years 1985 and 1986. Defendant caused Plaintiff to suffer all manner of harassment, intimidation, discrimination, unjust false charges, emotional distress and fear for his life and safety.

Plaintiff was employed at Norfolk Southern Tariff Bureau, Roanoke, VA. and was a member of BRAC Union local protective committee for about 10 years and actively reported violations of Union/Company work rules. Repeatedly, threats were made against the life of Plaintiff. Agents of Defendant opposed and blocked investigation of those threats. Supervisor Mildred Berry told Plaintiff that the Norfolk & Western 'Mafia' would get rid of him. On Nov. 19, 1985, G.W. Ford, Medical Director of Defendant, refused to allow Plaintiff to have a union representative present during a meeting at his office. The actions of Defendant were cited to be unlawful and have no place in any grievance procedure. The Railway

Adjustment Board cannot prosecute crimes or award damages to injured parties such as those damages requested in this case. District Court entered summary judgment for defendant on June 30, 1987, while Plaintiffs interrogatories and request for production of documents were not properly, if at all, answered by defendant. Plaintiff believes District Court violated Federal Rules of Procedure. Summary judgment is unlawful. Plaintiff filed Notice of Appeal to U.S. Court of Appeals Fourth Circuit on July 21, 1987. Court of Appeals rendered judgment on Dec. 30,1987. Jan. 7, 1988 Plaintiff mailed Petition for Rehearing to Court of Appeals. Appeals Court denied Petition on Jan. 26, 1988.

ARGUMENT FOR GRANTING WRIT

District Court violated Rules of Procedure. A narrow grievance procedure with Railway Adjustment Board cannot provide an award such as is requested. District Court must NOT be allowed to excuse and protect railroads and their officers from unlawful activities they might perform, nor to make the ludicrous judgment that all nefarious actions by officers and employees of railroads will be hidden and forgiven by placing their acts under the narrow grievance procedure. The Labor Union of Plaintiff has told him that the Railway Adjustment Board cannot handle this matter in any grievance/claim. Plaintiff has no other court of action except the courts which are bound by law

to recognize this action. The court's attention is directed to Plaintiff's Informal Brief which shows the court overlooked fact and law. Appeals Courts AND the Supreme Court has ruled that such cases are properly before the court when a request to award damages are a part of the action. The Court has not cited any provision of the RLA wherein criminal actions suffered by Plaintiff, are called 'minor disputes' for grievance procedures.

Derogatory statements,about Ferguson,in Appendix C are NOT TRUE.

A P P E N D I X

APPENDIX "A"

UNITED STATES COURT OF APPELAS FOR THE

FOURTH CIRCUIT NO. 87-3115

LEWIS O. FERGUSON, Plaintiff - Appellant

v.

Norfolk Southern Corp, Defendant -Appellee

Appeals from the United States District Court for the Western District of Virginia, at Roanoke, VA. James C. Turk, Chief District Judge. (C/A NOS. 87-98(NO. 87-3113), 87-68(NO. 87-3115); 87-87(NO. 87-3116)).

Submitted: Nov. 30, 1987 Decided:Dec. 30,1987

Before PHILLIPS and ERVIN, Circuit Judges,and BUTZNER, Senior Circuit Judge.

(LEWIS O. FERGUSON, Appellant Pro Se.

William Fain Rutherford,Jr., William B. Poff. Woods, Rogers & Hazlegrove, for Appellees.)

PER CURIAM:

A review of the record and the district courts opinion discloses that this appeal from that court's order finding Plaintiff's claim to be minor disputes within the exclusive jurisdiction of the Nat'l. R.R. Adj. Bd. is without merit. Because the dispositive issues recently have been decided authoritatively, we dispense with oral argument and affirm the judgment below on the reasoning of the district court. FERGUSON v. Roanoke Valley Psychiatric Center, C/A Nos. 87-98,87-68,87-87(WD. VA. June 30, 1987). AFFIRMED

APPENDIX "A"

UNITED STATES COURT OF APPEALS FOR THE

FOURTH CIRCUIT NO.87-3115

Filed Jan.26, 1988, U.S. Court of Appeals, Fourth Circuit

LEWIS O. FERGUSON, Plaintiff - Appellant

v.

Norfolk Southern Corp, Defendant -Appellees

On Petition for Rehearing

Upon consideration of the Appellant's pro se petitions for rehearing, IT IS ORDERED that the petitions for rehearing are denied. Entered at the direction of Judge Ervin, with the concurrence of Judge Phillips and Senior Judge Butzner.

for the Court

John M. Greacen
Clerk

APPENDIX "B"

APPENDIX "C"

IN THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF VIRGINIA, ROANOKE DIVISION

LEWIS O. FERGUSON, Plaintiff v. Norfolk Southern Corp., Defendant	Civil Action No. 87-0068
LEWIS O. FERGUSON, Plaintiff v. Mildred Berry and Norfolk Southern Corp., Defendant	Civil Action No. 87-0087
LEWIS O. FERGUSON, Plaintiff v. Roanoke Valley Psychiatric Center, Walter B. Blair, and Norfolk Southern Corp., Defendants	Civil Action No. 87-0098

O R D E R

For the reasons stated in the accompanying

Memorandum Opinion, it is hereby

O R D E R E D that summary judgment be entered on behalf of the defendants in each of the three cases.

This is a final order. The Clerk is directed to strike these cases from the court's active docket.

ENTER: This 30th day of June, 1987.

James C. Turk
CHIEF U.S. District Judge

MEMORANDUM OPINION

By: James C. Turk
Chief U.S. District Judge

These three cases have come before the court on defendants' motions to dismiss.[1] All three cases arise out of one series of disputes between the plaintiff and his employer, the Norfolk Southern Corp. The court finds that all three cases involve minor disputes that fall under the exclusive jurisdiction of

the Nat'l. R.R. Adj. Bd. and on that basis will grant summary judgment in favor of the defendants in all three cases. BACKGROUND

The Plaintiff, Lewis O. Ferguson is a long-time employee of the Norfolk Southern R.R. (NS). During the times relevant to these actions, he was a clerical employee at the NS Tariff Bureau in Roanoke, VA. Also at those times, he was a member of the Brotherhood of Railway Airline and Steamship Clerks, Freighthandlers Express, and Station Employees (BRAC), the collective bargaining agent for NS employees. Additionally, Ferguson served on BRAC's "local protective committee," a position that entailed his reporting violations of work rule violations to BRAC and its local chairman.

In August 1985 the railroad began receiving numerous complaints from employees at the

Tariff Bureau. Some of these were charges by Ferguson against his co-workers. The others were complaints against Ferguson by other employees at the Tariff Bureau. The volley of charges and countercharges between Ferguson and his co-workers was repeated so frequently that the railroad police department handled them in one ongoing investigation of personnel within the Tariff Bureau. The crux of Ferguson's numerous allegations was that his fellow employees were engaged for unknown reasons in a deliberate attempt to harass and annoy him. The specific incidents he described ranged from people tampering with his desk and anonymous threatening phone calls to a man threatening him with a knife. While the record alludes to only one or two specific allegations by Ferguson's co-workers, it indicates that their ongoing concern was Ferguson's

repeated interrogation of them to discover the identity of his tormentor. One specific allegation, which is in the record, is that on January 24, 1986 Ferguson threatened to bring a gun to work. Ferguson disputes that allegation. He claims it was a result of a co-worker's misunderstanding of a joke he made about terrorism.

Following the gun incident, on Feb. 7, 1986 railroad police officer F.D. Moorman interviewed Ferguson in the presence of Ferguson's supervisor, Ms. Mildred A. Berry. During the hearing Berry allegedly commented about Ferguson's repeated written complaints about his co-workers. According to Ferguson, she accused him and his wife of lying and making false accusations to NS supervisory personnel.

Concurrent with the dispute between Berry and Ferguson concerning the interview with

Moorman, the animosity between Ferguson and his co-workers precipitated a second dispute. On Feb. 27, 1986, Berry advised Ferguson that she had scheduled him to see Dr. W.B. Blair, a local psychiatrist. Dr. G.W. Ford, the NS Medical Director had arranged for Ferguson and another Tariff Bureau employee to visit Dr. Blair as a result of the ongoing problems between Ferguson and the other man. Ferguson initially refused to consent to the psychological exam. However, on Feb. 7th he was given a release from duty and he voluntarily left work to go to Dr. Blair's office. At the outset of the appointment, Ferguson handed Dr. Blair a letter stating that he was reporting against his will, that he would not pay for the appointment, and that he refused to consent to the release of any report of the evaluation. Although Dr. Blair advised Ferguson that he

was free to leave, Ferguson agreed to stay because he had been sent there at the order of his employer. As Dr. Blair commenced to examine Ferguson it became clear that Ferguson would not furnish answers sufficient to serve as the basis for an accurate psychological evaluation. It is disputed whether or not Ferguson's evasiveness was the result of his intentional uncooperativeness. After the brief, unfruitful examination Dr. Blair notified Dr. Ford that as a result of Ferguson's useless responses he was unable to submit to MS a mental status evaluation of Ferguson.

Ferguson's visit with Dr. Blair ended at 12:17 p.m. yet he did not return to his office on that day until 3:00 p.m. When he finally did return, Berry asked him about the delay. Although it is unclear exactly what Ferguson said to her, she interpreted his response as

insolent and disrespectful. On Feb. 18,1986 pursuant to Rule 14 of the collective bargaining agreement between NS and BRAC, NS served Ferguson with notice of several charges against him: (1) dereliction of duty for failing to return promptly to work on Feb. 7; (2) insubordination for his insolence and failure to respond adequately to Berry's curiosity about his delay and; (3) insubordination for refusing to cooperate with Dr. Blair.

Following an investigation and a hearing, Ferguson was found guilty of insubordination and dereliction of duty. As a disciplinary measure, NS suspended Ferguson from work effective 4:50 p.m. on Feb. 12, 1986 and ending 8:00 a.m. on March 17, 1986. On Ferguson's behalf, BRAC appealed the suspension to Public Law Board 3751, which is convened under the authority of the Railway Labor Act 45

U.S.C - 153. That case is still under the Board's consideration.

Following a second refusal to submit to an examination by Dr. Blair, NS referred Ferguson to a second psychiatrist, Dr. Wm. D. Clarkson. Ferguson did cooperate with Clarkson. Subsequently, Dr. Clarkson submitted to Dr. Ford an in depth evaluation of Ferguson. He diagnosed Ferguson as exhibiting "(P)ersonality disorder, mixed with passive aggressive and paranoid features." Dr. Clarkson concluded that Ferguson was likely not to be a threat to himself or to his co-workers, but he advised the railroad to let Ferguson transfer to another position away from the employee with which he had the most conflict. About two and a half weeks after Dr. Clarkson submitted his report, Ferguson wrote to Clarkson accusing the doctor of baiting him,

misdiagnosing him, and of intentionally misrepresenting his condition in order to make him "look bad."

Case No. 87-68

In the first action, Ferguson sues NS for the incidents surrounding the investigation by the railroad police, the accusations by Berry, and for his suspension following the visit with Dr. Blair. He alleges that those actions were in retaliation for his Union Activities and that they constitute a deprivation of his rights without due process of law.

Case No. 87-87

The second case, removed here from state court arises out of the comments Berry made during the interview with Ferguson and officer Moorman. Ferguson alleges that Berry's remarks were slanderous under Va. Code - 18.2-416. He asks for damages from NS and Berry to

compensate for the suffering and mental distress that the statements caused him.

Case No. 87-98

In the third suit, also removed from state court, Ferguson sues NS, Dr. Blair, and the Roanoke Valley Psychiatric Center(RVPC), the place where Dr. Blair leases office space. He alleges that NS had no just cause initially to refer him for psychiatric evaluation and that Dr. Blair lied to NS about his refusal to cooperate during the examination. He claims that these wrongful acts led in turn to his wrongful discipline and suspension. Finally, he accuses Dr. Blair of violating Va. Code 8.01-413 by failing to provide him with a copy of a psychological report that he believes Dr. Ford prepared.

DISCUSSION

The defendants have offered several arguments in support of their motions to dismiss. The one that is most encompassing and that justifies dismissal of all three cases is that Ferguson's cases all involve minor disputes which, pursuant to the Railway Labor Act(RLA), 42 U.S.C. 152 et seq., are outside of the district court's jurisdiction. The RLA governs labor relations in the railroad industry. As part of its mandate, the RLA directs employers and employees in the railroad industry to resolve most job related disputes without recourse to the courts. 45 U.S.C. 152, 153. All disputes between a railroad and its employees that involve "the interpretation or application of agreements concerning rates of pay, rules, and working conditions" are to be resolved by the Nat'l. R.R. Adj. BD(NRAB)

42 U.S.C. 153. These disputes, referred to as minor disputes, are within the NRAB's exclusive jurisdiction. Federal court are therefore without power to resolve minor disputes. Andrews v. Louisville & Nashville R.R. Co., 406 U.S. 320,325(1972). Further, NRAB decisions over minor disputes are almost invariably final and may be reviewed or relitigated in courts only under the narrowest of circumstances. Union Pacific R. Co. v. Sheehan, 439 U.S. 89, 93-94(1978). Unless the NRAB (1) fails to comply with the RLA; (2) fails to confine itself to the bounds of its jurisdiction or; (3) exhibits fraud or corruption, a court is powerless to review issues properly and previously brought before the NRAB. Id. at 93. Ferguson's actions against the R.R. for harassment and improper suspension in retaliation for Union activity and in his charges

against Dr. Blair and RVPC are minor disputes within the NRAB's exclusive jurisdiction. Ferguson's characterization of NS's conduct as improper implies the existence, and violation, of certain duties and standards of behavior. The source of these duties and standards is the collective bargaining agreement. "Since the NRAB has exclusive jurisdiction over disputes involving contractual interpretation of collective bargaining agreements between carriers and their employers, it follows that only the (NRAB) can determine the propriety" of NS's conduct. Choate v. Louisville & Nashville R.R. Co.,715 F.2d 369, 371-72(7th Cir. 1983). Although Ferguson argues that NS's anti-union animus and its retaliatory tactics take this case beyond the limits of a contractual minor dispute, in light of the NRAB's familiarity with contractual

disputes and its expertise in understanding a carriers duties under a collective bargaining agreement, there is, however,"no reason to believe that the (NRAB) could not adequately address and resolve a claim of pretexual discipline motivated by anti-union animus." Thacker v. Norfolk & Western Ry. Co., No. 84-1166, slip op. at 14(W.D. Va. July 29, 1985); quoting Local Union 808, Int'l. B'hood of Teamsters v. N&W R.R. Co., 576 F. Supp. 693, 7093 (D. Conn. 1983); see also, Morris v. Winston-Salem Southbound Ry. Co., No. 85-1894, slip op. at 6-7 (4th Cir.,Nov.5,1986). The court is also convinced that the RLA is applicable to the case against Dr. Blair and RVPC, despite Ferguson's contention that they are outside NRAB's jurisdiction because they are not officially connected to the R.R. Ferguson's contact with Blair and RVPC was

at the direction of the R.R. as part of its investigation of internal departmental unrest. Dr. Blair made the allegedly false statements in the context of an NS investigation and hearing. Thus, the gravamen of the case against Blair and RVPC is the railroad's abuse of investigatory process, a matter substantially covered in the collective bargaining agreement and one within the NRAB's exclusive jurisdiction. Magnuson v. Burlington Northern, Inc., 576 F.2d 1367, 1369-40(9th Cir.),cert. denied, 439 U.S. 930(1978). Finally, Ferguson is barred from litigating the issue of his discipline and suspension here because he is concurrently addressing the same issue in his appeal before the Public Law Board. Andrews, supra, 406 U.S. at 325. It is therefore clear that Ferguson's right to resort to Federal court to vindicate his wrongful

discipline claim is circumscribed by the RLA. The RLA also bars Ferguson's suit for defamation against Berry and NS. While defamatory statements ar not covered specifically by the collective bargaining agreement between NS & BRAC, the fact that a claim is not expressly addressed by an agreement is immaterial for purposes of coverage by the RLA. Elgin J&E Ry. v. Burley, 325 U.S. 711, 723(1945). Investigations of employee complaints are covered by the NS-BRAC agreement and are normal incidents of the employer-employee relationship. Majors v. U.S. Air, Inc., 525 F. Supp. 853, 857(D.Md. 1981). Any dispute arising out of such an investigation, including a charge of defamation, should fall within the NRAB's exclusive jurisdiction. See, e.g., Miller v. Norfolk & Western Ry. Co., No.83-3652, slip op. (N.D. Ohio 1984); Farley v.

Hayes, 112 L.R.R.M. 2298(S.D. Ill. 1982); Majors, supra, 525 F.Supp. at 853; Carson v. Southern Ry. Co., 494 F. Supp. 1104(D. S.C. 1979). Thus even if Berry did defame Ferguson when she remarked about him during officer Moorman's interview, then that issue can be resolved only by the NRAB. This court, however, is without jurisdiction to address that issue.

CONCLUSIONS

The actions that LEWIS O. FERGUSON has brought against NS, Mildred Berry, Walter Blair, M.D. and the Roanoke Valley Psychiatric Center are minor disputes which, under the provisions of the RLA, fall under the exclusive jurisdiction of the NRAB. Because the court is without jurisdictin to hear these claims, it will grant summary judgment in favor of the defendants. An order

consistent with this opinion will be entered on this day.

DATED: This 30th day of June, 1987.

James C. Turk
Chief U.S. District Judge

NOTE: The original writ of certiorari was on legal size paper and was notorized and mailed to this court on April 20, 1988. This booklet form is now submitted to the court as instructed by Francis J. Lorson, Chief Deputy Clerk, U.S. Supreme Court.